UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Rocky Well Service, Inc.,	)	
and	)	
Edward J. Klockenkemper,	)	DOCKET NO. SDWA-05-2001-0002
	)	
Respondents.	)	

INITIAL DECISION

This is an action by the Director of the Water Division, Region 5, United States Environmental Protection Agency ("Complainant" or "U.S. EPA") pursuant to section 1423(c) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h-2(c), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22. Respondents are Rocky Well Service, Inc., and Edward J. Klockenkemper. In its Amended Complaint, Complainant alleges that Respondents failed to test the mechanical integrity of six Class II underground injection wells in a timely manner (Counts I and II) and failed to submit Annual Well Status Reports for the six wells (Count III) and thus violated the SDWA and the Illinois Administrative Code. In a Partial Accelerated Decision issued on December 27, 2006, I granted Complainant's Motion for Accelerated Decision as to the liability of both Respondents as to Counts I and II and certain claims in Count III that were not otherwise dismissed.[1]

[1] The Partial Accelerated Decision is hereby incorporated in full.

In April of 2007, a three-day hearing was held in Mt. Vernon, Illinois.[2] The hearing was limited to the issue of the appropriate penalty to be assessed for these violations pursuant to section 1423(c) of SDWA, the Region 5 Underground Injection Control Proposed Administrative Order Penalty Policy and the Consolidated Rules.

I. Statutory and Regulatory Background

Section 22.27 of the Consolidated Rules provides in part:

> (b) *Amount of civil penalty*. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), provides that:

> In assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including. (i) the seriousness of the violation; (ii) the economic impact (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

The Consolidated Rules establish that the Complainant has the burdens of presentation and persuasion that the relief sought is appropriate. 40 C.F.R. § 22.24(a). As the Environmental Appeals Board has determined, this burden goes to the appropriateness of the penalty taking all factors into account:

> [F]or the Region to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in [the statute] and that its recommended penalty is supported by its analysis of those factors. [Footnote omitted.] The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie

[2] Excerpts of the hearing testimony are referred to herein by the date of the transcript (*i.e.*, Tr. 4/24) and page number(s).

> case can be made. Once this is accomplished, the burden of going forward shifts to the respondent. To rebut the Region's case, a respondent is required to show (1) through the introduction of evidence that the penalty is not appropriate because the Region had, in fact, failed to consider all of the statutory factors or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not 'appropriate.'

New Waterbury, Ltd., 5 E.A.D. 529, 538-39 (EAB 1994).

In this case, Complainant based its penalty calculation on the Region 5 Underground Injection Control Proposed Administrative Order Penalty Policy ("UIC Penalty Policy" or "Policy") effective September 21, 1994.[3] The Policy is based on the statutory factors for assessing a penalty and is designed to ensure that U.S. EPA considers and evaluates each of the six statutory factors in cases where it calculates a proposed penalty for a respondent's violations of the SDWA and the underground injection control ("UIC") regulations. Pursuant to the UIC Penalty Policy, penalties are determined by reviewing each of the six statutory factors. The Penalty Policy uses both a matrix, with ranges of penalty amounts for different types of violations, as well as a narrative approach to address all of the pertinent statutory factors in a particular case. See C. Ex. 141 at ¶¶ 4, 5.

The Environmental Appeals Board has emphasized that the agency's penalty policies should be applied whenever possible because such policies "assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *M.A. Bruder & Sons*, *Inc.,* 10 E.A.D. 598, 613 (EAB 2002). Indeed, the EAB will "closely scrutinize" a Presiding Officer's reasons for choosing not to apply an agency penalty policy to determine if those reasons are compelling. *Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002).

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[3] C. Ex. 47. The parties' hearing exhibits are referenced herein as "C. Ex. #" and "R. Ex. #."

U.S. EPA argues that it considered each of the SDWA's statutory penalty factors as well as the Region 5 UIC Penalty Policy in calculating a penalty of $105,600 in this matter. Further, U.S. EPA argues that the evidence introduced at the hearing demonstrates that it "showed extraordinary deference to Respondents' circumstances in calculating a penalty that could have been exponentially higher if the agency had strictly applied all of the recommendations in the Penalty Policy" and that Respondents did not present credible evidence that would justify any reduction in the amount of the proposed penalty.[4] Respondents argue that no penalty should be assessed because U.S. EPA failed "to prove a prima facie case as to gravity and penalty . . . since no fact finder could find for EPA based on the lack of supporting evidence and lack of differentiation between wells."[5]

I have considered the entire administrative record of this proceeding including, but not limited to, the pleadings, the transcript of the hearing, all proposed findings, conclusions and supporting arguments of the parties in formulating this Initial Decision. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant, or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

As required by the Consolidated Rules, I have determined the amount of the recommended civil penalty based on the evidence in the record and in accordance with the

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[4] Post-Hearing Brief of the United States Environmental Protection Agency, Rocky Well Service, Inc., No. SDWA-05-2001-0002 (Dec. 3, 2007) (hereinafter "Complainant's Post Hearing Brief") at 24.

[5] Respondent Edward J. Klockenkemper's and Rocky Well Service, Inc., Brief in Support of Proposed Findings of Facts and Conclusions of Law, Rocky Well Service., Inc., No. SDWA-05-2001-0002 (Dec. 21, 2007) (hereinafter "Respondents' Brief") at 25.

penalty criteria set forth in the Act, taking into consideration the Region 5 UIC Penalty Policy. I hereby assess of penalty of $105,590 jointly against Respondents for violations of the SDWA.

II. Penalty Calculation

In a Partial Accelerated Decision dated December 27, 2006, I determined that Rocky Well Service and Edward J. Klockenkemper were liable for (1) failure to test the mechanical integrity of two Class II UIC wells (Heulsing #1 and Zander #2) as required by December 19, 1996; (2) failure to test the mechanical integrity of four Class II UIC wells (Atwood #1, Harrel #1, Twenhafel #2 and Wohlwend #6) as required by September 1, 1995; and (3) failure to timely submit an Annual Well Status Report for the years 1996, 1997, and 1998. I now turn to the SDWA statutory penalty factors and the UIC Penalty Policy to determine an appropriate penalty.

1. The Seriousness of the Violation

The first statutory factor to consider is the seriousness of the violation. The Region 5 UIC Penalty Policy states that typically, the seriousness of the violation is the major factor considered when calculating a penalty. The Policy uses both a matrix, with ranges of penalty amounts for different types of violations, and a narrative approach to address all of the pertinent statutory factors in a particular case. The penalty amount for the seriousness factor is calculated by multiplying a penalty number (reflecting the level of seriousness and the number of wells in violation) by the length of violation. UIC Penalty Policy at 1.

The UIC Penalty Policy provides that several elements are to be considered in evaluating the seriousness of a violation, including (1) the *potential* of a particular violation to *endanger* underground sources of drinking water; (2) the number of wells in violation; (3) the importance of maintaining the integrity of the SDWA's regulatory scheme; and (4) the length of violation. *See* UIC Penalty Policy at 1-3. As to element (1), it is significant that the statute defines the term

"endanger" to include any injection which *may* result in the presence of contaminants in underground sources of drinking water ("USDWs"). 42 U.S.C. § 300h(d)(2). The Policy itself speaks to the "potential" for such endangerment. Thus, a violation need not rise to the level of actually causing harm to the environment for it to be of a serious nature. *See Carroll Oil Co.*, 10 E.A.D. at 657 (seriousness of a violation is or can be based on potential rather than actual harm); *see also Everwood Treatment Co., Inc.*, 6 E.A.D. 589, 603 (EAB 1996), *aff'd* No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998) (certain violations may have "serious implications" for the [statutory] program and can have a "major" potential for harm regardless of their actual impact on humans and the environment).

a. Failure to demonstrate mechanical integrity (Counts I and II)

Region 5's UIC Penalty Policy directly addresses the seriousness of a failure to demonstrate mechanical integrity:

> Mechanical integrity is one of the cornerstones of an effective UIC program because it is the simplest and most appropriate method to show mechanical soundness of the well both in construction and operation and lack of migration of fluids to USDWs. A leak in the casing, tubing or packer of a well or any fluid movement adjacent to the wellbore, may cause contamination of an underground source of drinking water. Even if a well is not currently operating and is temporarily abandoned, the mechanical integrity must be demonstrated because the well may function as a conduit for injected or formation fluids and has the potential to contaminate a USDW.

UIC Penalty Policy at 14-15.

Complainant produced ample evidence at the hearing to demonstrate the potential for environmental harm that can result from failure to conduct mechanical integrity testing of underground injection wells.[6] There are approximately 8,000 Class II underground injection wells in Illinois, all of which have the potential to leak and contaminate ground water. Injection

[6] U.S. EPA submitted at hearing the Written Testimony and Affidavit of Lisa R. Perenchio, Chief of the Direct Implementation Section of Region 5's UIC Program (C. Ex. 141.) Ms. Perenchio has approximately twenty years of supervisory experience in the UIC Program.

wells are designed to dispose of brine, and if they leak, they can contaminate ground water. Brine from oil and gas operations can contain any one of a number of contaminants including chloride, sulfate, iron, sodium, barium, benzene, ethyl benzene, toluene and xylene. Because most of what takes place in an injection well occurs underground, mechanical integrity tests are the only way to determine if an injection well leaks underground. A timely and correctly performed mechanical integrity test can detect a leak of a UIC Class II well at a point in time before contaminants reach underground sources of drinking water, which the SDWA is designed to protect.[7] In addition, the record establishes that both operating and non-operating injection wells can pose a risk of contamination to USDWs.[8] All of these facts contribute to a conclusion that the violations at issue here warrant a penalty calculated on the basis of a high level of seriousness.

Once a seriousness level is determined, the Policy directs that a penalty dollar amount be assigned from a range of figures set out in Table II. Table II identifies $1,000 to $10,000 as the appropriate range of penalties for high seriousness violations. In selecting a penalty figure in this range, the Policy suggests that U.S. EPA consider several factors including: the potential for Respondents' failure to timely conduct mechanical integrity testing to endanger underground sources of drinking water, the number of wells in violation, and the importance of the violation to the regulatory scheme which protects underground sources of drinking water. In this case, Respondents were operating six wells in violation of the mechanical integrity testing requirement for periods of time varying from over four to nearly ten years.[9]

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[7] See generally C. Ex. 141 at ¶¶ 26, 27. Ms. Perenchio's testimony regarding the serious nature of a violation for failure to conduct a mechanical integrity test was corroborated at the hearing by Illinois Department of Natural Resources (IDNR) inspectors Gail Matlock (Tr. 4/24 at 205-207) and Anita Brown (Tr. 4/25 at 50-51).

[8] Tr. 4/24 at 205-07, Tr. 4/25 at 170-71.

[9] See Joint Stipulation (filed Dec. 17, 2007) ("Joint Stipulation") at 1.

U.S. EPA also considered the small size of Respondent's business and his advanced age, although not specifically required to do so under the UIC Penalty Policy. The agency determined that $1,000, the lowest penalty multiplier in the high seriousness level matrix, was appropriate for the violations in this case and then selected only one well (out of the six that have been found to be in noncompliance) to apply the $1000 penalty multiplier by the number of months of noncompliance to arrive at a total gravity penalty for Count I of $54,800.[10] U.S. EPA applied the same analysis to arrive at a total gravity penalty for Count II of $60,000.[11]

Respondents argue that Complainant's calculation of the gravity penalty component is flawed because it failed to consider specific facts as to each of the six violating wells and the nature of the environment surrounding each of the six wells and any USDWs. Respondents further argue that the testimony and affidavit of Lisa Perenchio are insufficient to establish the seriousness of the violations because Ms. Perenchio "did not present any factual evidence supporting her assertions that the programmatic severity of the MIT violations indicated that a high deterrent penalty component should be added to the gravity" and that Complainant failed to establish "that there was a USDW present under any well, or what the name and location of the supposed USDWs were."[12] Respondents maintain that the agency's selection of a high seriousness level was driven solely by the category of the violation, not a "particularized evaluation of the circumstances of each violation."[13] Respondents cite to three U.S. EPA administrative cases in support of their argument that failure to consider well specific information can be considered a failure to prove its proposed penalty under 40 C.F.R. § 22.24.

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[10] C. Ex. 141 at ¶ 29. Complainant's calculation also takes into account the agency's Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19 (2007), which authorizes increased penalty amounts for SDWA UIC violations that occur on or after January 31, 1997. See C. Ex. 141 at ¶¶ 1, 29; Complainant's Brief at 2 n.2, 12 n.9.

[11] See C.Ex. 141 at ¶¶ 30 – 35.

[12] Respondents' Brief at 9-10.

[13] *Id*. at 3.

Upon close analysis, however, these cases do not compel a rejection of Complainant's penalty calculation.[14]

Moreover, as recited above, Ms. Perenchio's affidavit establishes more than sufficient factual evidence to support her assertion of the "programmatic severity" of Respondents' violations for failure to conduct mechanical integrity testing on the six wells. While Respondents are correct that the record does not contain well-specific information as to the presence of underground sources of drinking water in the vicinity of any of the six wells, case law is clear that a demonstration of actual harm to a specific aquifer is not required in order to assess a penalty for a high level of seriousness. Harm to the statutory program is sufficient.[15] In this case, Ms Perenchio applied the statutory penalty factors to the facts of these violations as directed by the UIC Penalty Policy. The Policy permits the agency to determine the seriousness of the violation as reflective of the *potential* of a particular violation to endanger USDWs, "endanger" being defined by the statute as an injection which *may* result in the presence of contaminants in USDWs. 42 U.S.C. § 300h(d)(2). Thus, the agency is not required to demonstrate actual harm to a specific aquifer in order to assess a penalty of a high level of seriousness under the UIC provisions of the SDWA.

At hearing, Respondents submitted the written and oral testimony of John H. Morgan, a geologist and former Division Chief of the Oil and Gas Division of the Illinois Department of

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[14] In *Gypsum North Corp., Inc.*, CAA-02-2001-1253, 2002 EPA ALJ LEXIS 70, *26 (Nov. 1, 2002), the Administrative Law Judge ("ALJ") rejected U.S. EPA's penalty calculation because the policy at issue there "afford[ed] no individualized assessment of the particular facts surrounding the violation." Here, Complainant's witness explained precisely how she calculated the gravity-based penalties for Counts I and II and considered Respondents' specific circumstances to calculate an overall reduced gravity-based penalty in this matter. The ALJ's penalty calculation in *Carroll Oil Co.*, RCRA-0-99-05 2001, EPA ALJ LEXIS (Apr. 30, 2001) to which Respondent cites was subsequently rejected by the Environmental Appeals Board which performed its penalty analysis *de novo*. *Carroll Oil Co.*, 10 E.A.B. at 661. Finally, in *Bil Dry*, RCRA-III-264, 1998 EPA ALJ LEXIS 114 at *63-65 (Oct. 8, 1998), the ALJ rejected the agency's penalty calculation because the agency failed to appropriately calculate the multi-day component of its proposed penalty, which is not an issue here.

[15] *Phoenix Construction Services, Inc*., 11 E.A.D. 379, 396-400 (EAB 2004); *Predex Corp*., 7 E.A.D. 591, 601-02 (EAB 1998) (violation of FIFRA's registration requirements is programmatic harm which alone is sufficient to support a substantial penalty).

Mines and Minerals. Mr. Morgan's written testimony concludes that "due to a demonstrated lack of actual or serious potential harm, the EPA penalty basis and amount is unsupported in theory or fact, and that the amount is unreasonably high."[16] Specifically, Mr. Morgan states in his written testimony:

> Given the absence of empirical data indicating an actual impact on a USDW through which any of the six wells passes, and given the construction of the wells and their passing of MIT, there is not a reasonable basis to conclude that any impact whatsoever occurred on a USDW as a result of the testing violations of the six wells.

R. Ex. 180 at 5. This testimony, however, overlooks the fact that the agency does not need to establish actual harm to a specific USDW to assess a penalty based upon a high level of seriousness. Moreover, Mr. Morgan's statement that the four wells that were not active posed a "much lesser potential for USDW endangerment or contamination" is contradicted by other credible evidence in the record that indicates that a non-operating injection well that had once been operational still presents a risk of contamination to USDWs.[17] But more importantly, Mr. Morgan's testimony failed to rebut Complainant's evidence regarding the importance of mechanical integrity demonstrations and the potential for environmental harm that can result from failure to conduct such tests as required by law, which provides the basis for Complainant's assignment of a high level of seriousness to the Count I and II violations. Given that most of what occurs with respect to the operations of an underground injection well takes place underground, mechanical integrity tests are the only way to determine if a well is leaking and

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[16] At hearing, I ruled that Mr. Morgan's testimony as to the appropriateness of the penalty assessed in this matter would not be considered "expert" testimony because that subject matter is not appropriate for expert testimony. Tr. 4/26 at 211-212, 222. Further, on voir dire, Complainant's counsel presented evidence that Mr. Morgan was not currently a licensed geologist in either Illinois or Indiana, and he admitted as such. Tr. 4/26 at 212-218. Mr. Morgan was allowed to testify as an expert geologist on well construction and conditions of the wells based upon his training and experience. Tr. 4/26 at 220.

[17] *See* n.8 *supra*.

posing a threat to the surrounding environment. Thus, I find Mr. Morgan's testimony unpersuasive on the issue of the seriousness of the violations at issue.[18]

b. Failure to submit annual well status reports (Count III)

Complainant again produced ample evidence at the hearing to establish the seriousness of Respondents' failure to submit annual well status reports. Timely submission of annual well status reports is an important part of the UIC program to protect underground sources of drinking water. The integrity of the UIC program and, thus, the protection of these USDWs depends in large part upon self-reporting by well operators. There are approximately 8000 Class II wells in Illinois and not enough state inspectors to ensure compliance with the UIC regulations through inspections alone.[19] Annual reporting can serve as a reminder to well operators to comply with UIC Class II well requirements while allowing states and/or U.S. EPA to quickly evaluate compliance with regulatory requirements designed to protect the integrity of the wells and prevent harm to the environment.[20]

U.S. EPA's penalty calculation is based on Respondents' failure to submit annual reports for six wells for the years 1996, 1997 and 1998.[21] U.S. EPA determined that these violations warranted a "low level of seriousness" under the UIC Penalty Policy, which provides for a range of $200 to $1000 for such penalties. U.S. EPA selected a penalty of $300 per violation as the appropriate multiplier after considering the potential for Respondents' failure to timely submit annual well status reports for three years to endanger underground sources of drinking water, the

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[18] I also reject Respondents' suggestion that I disregard the Region 5 UIC Penalty Policy and adopt the penalty assessments calculated by the IDNR.

[19] C. Ex. 141 at ¶ 39.

[20] *Id*.

[21] U.S. EPA's Amended Complaint alleges that Rocky Well and Mr. Klockenkemper failed to submit Annual Well Status Reports for each of the six wells for the years 1991 and 1993-1998 and for five of the six wells for the year 2001, each report being due on May of the following year. Several of these claims were dismissed in the Partial Accelerated Decision issued on December 27, 2006 (at p. 9) and the only claims remaining are those for the years 1996 – 1998.

significant number of wells involved in this violation, and the importance of maintaining the integrity of the SDWA's regulatory scheme, which depends in large part on self-reporting by well operators.[22] U.S. EPA then applied the Civil Monetary Penalty Inflationary Adjustment Rule, 40 C.F.R. Part 19 (2007), and multiplied the adjusted low level of seriousness multiplier of $330 by three to arrive at a total gravity penalty figure of $990.[23] U.S. EPA then arrived at a total gravity based penalty of $115,790[24] and proceeded to apply the remaining statutory penalty factors.

I conclude that the seriousness of Respondents' violations for Counts I, II and III of the Amended Complaint warrants a penalty assessment of $115,790, and now turn to the remaining statutory factors.

2. The Economic Impact (If Any) Resulting from the Violation

The SDWA and the UIC Penalty Policy require consideration of the economic impact resulting from the violation. U.S. EPA calculated a total economic benefit component of $2,217 based on best information available on the costs of compliance, but chose not to incur the costs of retaining an expert witness to testify at hearing regarding these costs and, thus, opted not to seek an economic benefit component as part of its proposed penalty.[25]

3. History of Such Violations

The Safe Drinking Water Act and the UIC Penalty Policy require consideration of the compliance history of Respondents in assessing an administrative penalty. U.S. EPA gave consideration to this factor and noted numerous UIC violations identified and/or prosecuted by

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[22] *See* C. Ex. 141 at ¶¶ 38 – 39.

[23] In consideration of Rocky Well's status as a small business and Mr. Klockenkemper's age, U.S. EPA calculated the period of violation on the basis of years (3) instead of months (36) which significantly reduced the penalty figure for Count III. See C. Ex. 141 at ¶ 40.

[24] U.S. EPA then rounded the gravity component figure up to $115,800 (C. Ex. 141 at ¶ 54), a decision with which I do not concur.

[25] C. Ex. 141 at ¶ 43.

the state.[26] U.S. EPA chose, however, not to increase the proposed penalty on the basis of this factor.[27]

4. Any Good Faith Efforts to Comply

Under the SDWA, "any good faith efforts to comply with the applicable requirements" shall be taken into account in assessing the penalty. 42 U.S.C. § 300h-2(c)(4). Region 5's UIC Penalty Policy provides that a civil penalty may be adjusted downward by as much as 50% if the respondent has attempted in good faith to comply with the SDWA, or upward by as much as 50% if the violator has taken no steps to comply or has ignored the violations. According to the Policy, good faith efforts to comply *may* include: (1) prompt reporting of noncompliance, if such reporting is not otherwise required by law and (2) prompt correction of an environmental problem prior to formal commencement of an enforcement action by a governmental entity. UIC Penalty Policy at 6-7. The Policy does not, on its face, preclude consideration of other facts that might constitute good faith efforts. The Environmental Appeals Board has described "good faith efforts to comply" as "diligence, concern or initiative" evidenced by prompt response to agency inquiries about compliance status, keeping regulatory agencies informed of the physical conditions of its facilities, and seeking and following up on guidance from the agencies on how to work towards compliance. *Carroll Oil Co.,* 10 E.A.D. at 660-61. U.S. EPA found no evidence of good faith efforts to comply on the part of Respondents to warrant an adjustment of the penalty.[28]

Respondents maintain that the fact that "some compliance" or other good faith efforts occurred after the notice of violation or violation at issue does not in and of itself preclude consideration of such efforts as "good faith efforts to comply" and that such efforts should be

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[26] C. Ex. 141 at ¶ 45.
[27] *Id*.
[28] C. Ex. 141 at ¶ 53.

considered even where they "[fall] short of federal and state requirements."[29] Respondents argue that a party's written willingness to come into compliance and the proffer of a compliance plan can be considered indicia of good faith efforts. They also contend that a party's financial ability to come into compliance (versus ability to pay a penalty) should be considered when evaluating a party's good faith compliance efforts.[30]

Specifically, Respondents maintain that their communications with Illinois Department of Natural Resources and U.S. EPA and their efforts to keep both agencies apprised of "compliance efforts and compliance plans" constitute good faith efforts to comply that warrant a penalty reduction in this case. The record establishes that Respondents did indeed submit correspondence to both state and federal agencies over the course of several years in response to numerous notices of violation and that some of this correspondence indicated that Respondents planned to integrity test one or more wells. Some of the correspondence complains of the agencies' requiring "duplicating costly and expensive work [and] additional, compounded and conflicting alleged violations and requirements."[31] While Respondents requested to meet with IDNR, it appears from their correspondence that they hoped to further delay bringing the wells into compliance.[32] On October 13, 2000, and in response to a Notice of Violation from U.S. EPA, Respondents notified Complainant that while two wells were "ready to be tested," four were not due to litigation, "sabotage, theft and vandalism" and an inability to access one well.[33] In February of 2001, counsel for Rocky Well Service wrote to U.S. EPA in response to its receipt of a notice of the impending administrative complaint and stated that it was "willing to enter an agreement for a compliance schedule to resolve this matter" and provided a status report

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[29] Respondents' Brief at 5.
[30] Respondents' Brief at 5-6.
[31] R. Ex. 181 att. 49. Respondents' exhibits are referred to herein by reference to the document as it appears as an attachment to R. Ex 181, the Declaration of Edward J. Klockenkemper on behalf of Rocky Well Service, Inc.
[32] *Id*.
[33] R. Ex. 181 att. 55.

regarding each of the wells.[34] This correspondence, dated four to five years after the compliance deadlines for these wells, does not constitute the "prompt response" or the "diligence, concern, or initiative" that rises to the level of "good faith efforts to comply" with the mechanical integrity testing and annual reporting requirements of the SDWA.

Secondly, Respondents seek to establish good faith efforts by citing to their on-site activities such as "grading lease roads, constructing containment dikes and performing well workovers."[35] Such activities appear, however, to be part of the business of operating oil and gas wells, and are not necessarily aimed at accomplishing a mechanical integrity test. Moreover, none of these efforts occurred any earlier than 1997, over one to two years after the mechanical integrity testing compliance deadlines in this matter, and in fact, most occurred sometime after 2000.[36] Similarly, these actions are not evidence of "good faith efforts" to comply with those requirements.

Finally, Respondents argue that the Presiding Officer should consider their "financial ability to come into compliance" including the "presence of tax liens, mortgages and other indicia of debt or financial burden that could have contributed to the failure to timely comply" and cite to the ALJ decision in *Carroll Oil Co.* as support for this proposition.[37] This argument is rejected both on the facts and as a matter of law. First of all, the facts were not established at hearing to support this contention.[38] Secondly, given that the EAB rejected the

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[34] R. Ex. 181 att. 62.

[35] Respondents' Brief at 13.

[36] Similarly, a successful integrity test seven months after the issuance of a NOV and an attempt to integrity test in 2006 do not, without a demonstration of more continuous efforts, constitute good faith efforts to comply. *See* Respondents' Brief at 13.

[37] Respondents' Brief at 6 n.9.

[38] Respondents did not offer evidence of "tax liens, mortgages or other indicia of debt or financial burden" from which I could conclude that Respondents were without the financial wherewithal to come into compliance with the mechanical integrity testing and reporting requirements at issue here. While information provided by Respondent Rocky Well Service to Complainant indicates it has "little or no independent ability to pay a penalty" at this time (see C. Ex. 141 at ¶ 50), that does not necessarily lead to the conclusion that it did not have the financial wherewithal to comply with the mechanical integrity testing requirements in 1995 and 1996.

ALJ's penalty assessment in *Carroll Oil Co.*, I cannot look to that decision as binding precedent. Moreover, the EAB in that case, without deciding *per se* that a company's financial condition is not relevant to an evaluation of the "good faith attempts to comply" penalty factor, recognized that "companies are required to comply with their environmental requirements regardless of economic circumstance." *Carroll Oil Co.,* 10 E.A.D. at 671.

In conclusion, Respondents failed to demonstrate a minimum degree of diligence, concern, or initiative, or that they undertook "simple, minimal-costs actions" that could arguably constitute "good faith"[39] and no downward penalty adjustment is warranted.

5. Economic Impact of the Penalty on the Violator (Ability to Pay)

The SDWA and the UIC Penalty Policy require the agency to consider the economic impact of the penalty on the violator in assessing a penalty. At the commencement of the hearing, the parties submitted a Joint Stipulation which states in part:

> 2. Ability to Pay Not at Issue
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> The Parties agree and stipulate that the ability to pay and the finances of Respondents Rocky Well Services, Inc., and Edward J. Klockenkemper are not at issue for hearing.
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> 3. Economic Impact Considered by Complainant
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> In assessing the proposed penalty in the Amended Complaint, the Parties agree and stipulate that Complainant has met is burden to consider the statutory factor of the economic impact of the penalty on each Respondent, as set forth in Section 1423(c)(4)(B)(v) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(4)(B)(v).

Joint Stipulation at 2. Ms. Perenchio's written testimony states that "Complainant's financial expert has determined that Respondent Rocky Well Service has little or no independent ability to pay a penalty."[40] As to Respondent Klockenkemper, by previous order, I determined that he had waived his inability to pay claim and that no evidence related to this issue would be admitted at

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[39] *Carroll Oil Co.,* 10 E.A.D. at 660-661.
[40] C. Ex. 141 at ¶ 50.

hearing.[41] Because Mr. Klockenkemper had been found personally liable for the violations and had provided no evidence of his inability to pay, Complainant made no reduction in the proposed penalty on the basis of this factor. Thus, the record is clear that U.S. EPA appropriately considered the economic impact of the penalty on both respondents.

In a separate post-hearing submission, Rocky Well Service states that because it has no independent financial ability to pay a penalty, no penalty should be assessed against it.[42] In a joint submission, Respondents argue that the Presiding Officer should discount the penalty on account of Rocky Well's inability to pay prior to assessing any penalty stating: "the fact that [Rocky Well Service has an] undisputed inability to pay did not need to be argued as an issue at hearing does not mean that such inability should be ignored when calculating any final penalty in this matter, and. . . no penalty, or a sharp discount in the proposed penalty, should be assessed with regard to RWS."[43]

I conclude that Rocky Well's little or no ability to pay a penalty should not result in the reduction of a penalty in this matter because Mr. Klockenkemper has been found personally liable for the violations and has not demonstrated an inability to pay.[44] I find that Respondents Rocky Well Service, Inc. and Edward J. Klockenkemkper can afford to jointly pay the penalty assessed in this matter.[45]

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[41] Order Regarding Evidence on Ability to Pay and Scheduling of Prehearing Conference (Mar. 5, 2007).

[42] Respondent Rocky Well Service Inc.'s Proposed Findings of Facts, Conclusions of Law & Proposed Order, filed Dec. 19, 2007, at 2.

[43] Respondents' Reply *Instanter* to January 22, 2008, EPA Response (filed Feb. 4. 2008) at 4.

[44] This conclusion comports with agency policy that when a violator cannot afford to pay a penalty, the agency should "consider joinder of the violator's individual owners" and that a straight penalty reduction should only be considered as a last resort. A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (EPA General Enforcement Policy #GM-22) (Feb. 16, 1984) at 24.

[45] *See Sunbeam Water Co., Inc*., SDWA-10-97-0066, 1999 EPA ALJ Lexis 93, *27-28, 32, (Oct. 28, 1999).

6. Such Other Matters as Justice May Require

Finally, the Safe Drinking Water Act requires the agency to take into account "such other matters as justice may require." The UIC Penalty Policy states that where "equity would not be served by adjusting the proposed penalty by only the allowable 50% good faith effort adjustment" the Division Director may approve an "extraordinary adjustment" to the proposed penalty for "extraordinary circumstances, including significant litigation risk." Policy at 7. In assessing the proposed penalty in this case, Complainant took into account "the age of the individual Respondent in this matter, as well as possible interpersonal relationship difficulties that Respondents may have experienced with landowners and or tenants near the wells at issue" and further reduced the penalty by approximately 9.19% or $10,200.[46]

Respondents argue that U.S. EPA failed to appropriately consider "other matters as justice may require" in assessing the penalty in this matter. Specifically, Respondents argue numerous instances of interference by local farmers with their attempts to access or work the wells; muddy, impassable lease roads preventing access to the wells; plowing and planting of lease roads by local farmers; vandalism and theft of their equipment; and ongoing state court litigation that prevented Respondents from accessing the wells.

Credible evidence at the hearing establishes that IDNR inspectors were able to access the wells without any "extraordinary" measures.[47] One inspector noted in his inspection report that it was "possible to gain access to [the] well to temporarily abandon at any time."[48] Similarly, the record does not support a finding that muddy, impassable lease roads prevented access to the wells.[49] In fact, Respondents argue that their contractors accessed the wells on numerous

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[46] C. Ex. 141 at ¶ 54.
[47] Tr. 4/25 at 9; Tr. 4/24 at 142.
[48] Tr. 4/24 at 227; C. Ex. 71a.
[49] Tr. 4/24 at 227; C. Ex. 71a.

occasions during the relevant time period in order to "work the wells" to support their argument that they expended good faith efforts to comply with the UIC regulations.[50] While it appears that there may have been squabbles over the years between Respondents and individuals farming the areas surrounding the six wells, the evidence in this case does not establish that these occurrences in any way prevented Respondents from testing the mechanical integrity of the wells on a timely basis or that a reduction in the proposed penalty is warranted.

Finally, Respondents argue that certain state court litigation involving two of the six wells at issue here prevented them from complying with the mechanical integrity requirements because they did not have possession of the leases upon which the wells were located.[51] The record indicates that in 1977, Mr. Klockenkemper filed suit against Charles E. Fisher to obtain declaratory and injunctive relief and an accounting in connection with the Twenhafel and Wohlwend oil leases. Mr. Fisher claimed partial ownership of the leases under agreements which predated those of Mr. Klockenkemper.[52] This matter was litigated for over twenty years in two Illinois trial courts and one appellate court, resulting in default judgments, a vacated order later reinstated, and at least two appellate reversals of trial court rulings.[53]

Of significance to *this* matter is the 1994 judgment of the Fourth Judicial Circuit which held, *inter alia*, that "Fisher remained in possession of the Wohlwend lease after January 16, 1980, used the equipment and produced oil for his own benefit *until the present time* (emphasis added)," the date of that decision being December 5, 1994.[54] This decision is significant because it was rendered only nine months before the deadline for the mechanical integrity test of the

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[50] Respondents' Brief at 13; Tr. 4/26 at 133-152, 154, 161-162.

[51] In my earlier Partial Accelerated Decision in this case, I ruled that the impact of the state court litigation over the wells, while not an affirmative defense in this case, might be relevant to the determination of an appropriate penalty. Partial Accelerated Decision at 10-11.

[52] *Klockenkemper v. Fisher*, No. 5-96-0002 (Ill. App. Ct. Apr. 22, 1997) at 1 (R. Ex. 181 att. 35).

[53] *Id*. at 1-3, 9.

[54] *Klockenkemper v. Fisher*, No. 77-L-24 (Circ. Ct. Ill. Dec. 5, 1994), slip op. at 3 (R. Ex. 181 att. 27).

Wohlwend well and thus respresents the status of the litigation at the time Respondents were to have complied. The court further held that Mr. Fisher had abandoned his property that was left on the lease and noted that Mr. Klockenemper had paid property taxes on the lease while Fisher was in possession.[55] The court awarded Mr. Klockenkemper damages to put his lease in operable condition, for loss of oil production and for his share of equipment removed from the leases.[56] In my view, this decision put Mr. Klockenkemper on notice that the right to operate the wells was now his, and with a regulatory deadline facing him nine months ahead, the prudent course would have been to prepare the well to conduct the necessary mechanical integrity test before the regulatory deadline. An internal mechanical integrity test on this well was not completed until April 21, 2002.[57]

Respondents also ask the Presiding Officer to find that from 1992 to 1998, the Twenhafel well was also the subject of litigation and "Rocky Well did not have possession or the ability to operate" and that neither Rocky Well nor Mr. Klockenkemper operated the Twenhafel lease between 1987 and at least 1998.[58] While it is true that the Twenhafel well was the subject of litigation, this does not lead to the conclusion that Respondents did not have "possession or the ability" to operate the well. What is clear is that Mr. Klockenkekmper "had the right to operate the lease since 1987 and … [that he] failed to do so[.][59] Mr. Klockenkemper was found by the

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[55] *Id.* at 4.

[56] *Id.* at 3-4. This trial court decision was reversed in 1997 by the 5th District Appellate Court on the ground that the trial court incorrectly calculated the parties' ownership interests. The Appellate Court concluded, however, that Mr. Klockenkemper had "title to the leases and the oil produced therefrom" and that Mr. Klockenkemper and Mr. Fisher owned the property on the leases in proportion to their respective working interest ownership. The court further determined that Mr. Klockenkemper did little to protect his interests, that Fisher remained in possession of the Wohlwend lease by Klockenkemper's inaction, and that "any lack of production and/or related costs are attributable solely to Klockenkemper and should not be charged to Fisher." *Klockenkemper v. Fisher*, No. 5-96-0002 at 7-8.

[57] Joint Stipulation at 1.

[58] Respondents' Proposed Findings of Fact 243, 248.

[59] *Maschoff v. Klockenkemper*, 317 Ill. App. 3d 554, 560 (Dec. 7, 2000) (R. Ex. 181 att. 56).

trial court to have abandoned his leasehold due to nonproduction.[60] Such circumstances, however, do not afford Respondents the right to abandon their obligation to comply with the Illinois UIC regulations. In sum, nothing in these Illinois court decisions or the facts surrounding the litigation leads me to determine that the penalty in this matter should be adjusted any further downward in the interests of justice. I nonetheless concur in U.S. EPA's reduction of the penalty by $10,200 in recognition of Mr. Klockenkemper's age and difficulties encountered with local tenant farmers.

Upon consideration of the statutory penalty factors, the Region 5 UIC Penalty Policy, the evidence at hearing and the administrative record in this matter, Respondents are jointly assessed a penalty of $105,590.

Findings of Fact and Conclusions of Law

In accord with section 22.27(a) of the Consolidated Rules, 40 C.F.R. § 22.27, the undersigned Presiding Officer's Findings of Fact and Conclusions of Law on the penalty phase of this proceeding are as follows:

1. Section 1423(c)(4) of the SDWA, 42 U.S.C. § 300h-2(c)(4), sets forth the following factors to be considered in assessing a civil penalty: (i) the seriousness of the violation; (ii) the economic impact (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

2. The Region 5 Underground Injection Control Proposed Administrative Order Penalty Policy is based on the statutory factors set forth in the SDWA.

3. Complainant has the burdens of presentation and persuasion that the relief sought is appropriate.

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[60] *Id*.

4. Complainant has proposed a penalty of $105,600 for the violations for which Respondents have been found liable.

5. Respondents failed to perform mechanical integrity tests on six underground injection wells by the required deadlines of September 1, 1995 (four wells) and December 19, 1996 (two wells).

6. Respondents operated these six underground injection control wells in violation of the mechanical integrity testing requirements of the Illinois Adminstrative Code for periods of time varying from over four to nearly ten years.

7. Underground injection wells are designed to dispose of brine from oil and gas operations. If the wells leak, they can contaminate ground water. Brine from oil and gas operations can contain contaminants including chloride, sulfate, iron, sodium, barium, benzene, ethyl benzene, toluene and xylene.

8. Because most of what occurs in an injection well takes place underground, mechanical integrity tests are the only way to determine if any injection well leaks underground.

9. A timely and correctly performed mechanical integrity test can detect a leak of an underground injection well before contaminants reach underground sources of drinking water.

10. Both operating and non-operating underground injection wells can pose a risk of contamination to underground sources of drinking water.

11. The violations of failure to timely conduct a mechanical integrity test warrant a penalty calculated on the basis of a high level of seriousness under the SDWA and the UIC Penalty Policy.

12. Respondents operate a small business and the individual Respondent is of advanced age.

13. U.S. EPA is not required to demonstrate actual harm to a specific aquifer in order to assess a penalty of a high level of seriousness under the underground injection control provisions of the SDWA.

14. Respondents' expert witness failed to rebut Complainant's evidence of the seriousness of a violation of failure to timely conduct a mechanical integrity test.

15. Respondents' failure to submit annual well status reports for six wells for the years 1996, 1997 and 1998 warrants a penalty calculated on the basis of a low level of seriousness.

16. The seriousness of the violations proven in this matter warrant a total gravity penalty of $115,790.

17. Complainant considered the economic impact resulting from the violations but chose not to seek an economic benefit component as part of its proposed penalty.

18. Complainant considered the compliance history of Respondents in assessing its proposed penalty but did not increase the proposed penalty on that basis.

19. U.S. EPA found no evidence of good faith efforts to comply by Respondents to warrant an adjustment of the proposed penalty.

20. Respondents' communications with IDNR and U.S. EPA, including requests to meet with the agencies and proposed compliance plans, do not constitute good faith efforts to comply with the mechanical integrity testing requirements.

21. Respondents on-site activities, including grading lease roads, constructing containment dikes and performing well workovers, do not constitute good faith efforts to comply with the mechanical integrity testing requirements.

22. Respondents failed to demonstrate financial inability to comply with the mechanical integrity testing requirements.

23. Respondents failed to establish that their efforts to comply with the mechanical integrity testing requirements were thwarted or otherwise prevented by the actions of local farmers, impassable roads, vandalism or theft of their equipment.

24. Respondents Rocky Well Service, Inc., and Edward J. Klockenkemper can afford to jointly pay the penalty assessed in this matter.

25. Respondents failed to establish that they were unable to access the wells to conduct the mechanical integrity tests.

26. State court litigation concerning the ownership of the six wells at issue did not prevent Respondents from conducting the mechanical integrity tests.

27. Mr. Klockenkemper's age and difficult relations with local farmers warrant a reduction in the penalty of $10,200.

28. Upon consideration of the penalty factors set forth in the Safe Drinking Water Act, the Region 5 UIC Penalty Policy, the evidence at hearing and the administrative record in this matter, Respondents are jointly assessed a penalty of $105,590.

ORDER

1. A civil penalty of $105,590 is jointly assessed against Respondents Rocky Well Service, Inc., and Edward J. Klockenkemper.

2. Payment of the full amount of this civil penalty must be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) as provided below. Payment shall be made by submitting a certified or cashier's check payable to the "Treasurer, United States of America," to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondents must include the case name and docket number on the check and in the letter transmitting the check. Respondents must simultaneously send copies of the check and transmittal letter to the Regional Hearing Clerk and agency counsel at these addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 5
77 W. Jackson Blvd. E-13J
Chicago, IL 60604-3590

Cynthia Kawakami
U.S. Environmental Protection Agency
Office of Regional Counsel
77 W. Jackson Blvd. C-14J
Chicago, IL 60604-3590

3. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision will become the final order of the agency forty-five (45) days after service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Date: July 23, 2008

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Marcy A. Toney
Presiding Officer

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision dated July 23, 2008, was sent this day in the following manner to the addressees:

Original hand delivered to:	Regional Hearing Clerk U.S. Environmental Protection Agency Region 5 77 West Jackson Blvd. Chicago, IL 60604-3590
Copy hand delivered to Complainant's counsel:	Cynthia Kawakami Mary McAuliffe U.S. Environmental Protection Agency Region 5 Office of Regional Counsel 77 West Jackson Boulevard Chicago, IL 60604-3590
Copy by U.S. mail first class to:	Richard J. Day, P.C. 413 North Main Street St. Elmo, IL 62458
Copy by U.S. mail first class to:	Felipe N. Gomez P.O. Box 220550 Chicago, IL 60622

Dated: By: _____
Darlene Weatherspoon
Administrative Program Assistant